

**NOT FOR PUBLICATION**

**OCT 25 2007**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

JENNIFER L. LASTER; ANDREW  
THOMPSON; ELIZABETH VOORHIES,  
on behalf of themselves and all others  
similarly situated and on behalf of the  
general public,

Plaintiffs - Appellees,

v.

T-MOBILE USA, INC.; OMNIPOINT  
COMMUNICATIONS, INC., a Delaware  
corporation dba T-Mobile,

Defendants - Appellants,

And

VERIZON COMMUNICATIONS, INC., a  
Delaware corporation; CELLCO  
PARTNERSHIP, a Delaware corporation  
dba Verizon Wireless; VERIZON  
WIRELESS (VAW) LLC, a Delaware  
limited liability company, dba Verizon  
Wireless; AIRTOUCH CELLULAR, a  
Delaware limited liability company, dba  
Verizon Wireless; CINGULAR  
WIRELESS LLC, a Delaware limited

No. 06-55010

D.C. No. CV-05-01167-DMS

MEMORANDUM<sup>\*</sup>

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

liability company; GO WIRELESS, a  
California corporation; NEW CINGULAR  
WIRELESS PCS, dba Cingular Wireless,

Defendants.

Appeal from the United States District Court  
for the Southern District of California  
Dana M. Sabraw, District Judge, Presiding

Submitted October 16, 2007\*\*  
Pasadena, California

Before: PREGERSON, HAWKINS, and FISHER, Circuit Judges.

T-Mobile USA, Inc., Omnipoint Communications, Inc., and TMO CA/NV, LLC  
(collectively, “Appellants”) appeal from the district court’s order denying their motion  
to compel arbitration. We affirm.

Although Appellants argue that their arbitration provision is not procedurally  
or substantively unconscionable under California law, the Appellants’ agreement—  
which requires customers to waive class action and bring claims only in an individual  
capacity—is not substantively distinguishable from the Cingular arbitration agreement  
this court held unconscionable in Shroyer v. New Cingular Wireless Servs., Inc., 498  
F.3d 976, 2007 WL 2332068, at \*5-9 (9th Cir. 2007).

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\*\* The panel unanimously finds this case suitable for decision without oral  
argument. See Fed. R. App. P. 34(a)(2).

Appellants argue their agreement is not procedurally unconscionable because customers accepted the arrangement from the outset and could have elected a different mobile phone company; however, this court specifically rejected the “marketplace alternatives” rationale in Shroyer, *id.* at \*7-8, and California courts have done the same, Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 582-85 (2007).

Shroyer also expressly and conclusively rejected the argument that California law is preempted by the Federal Arbitration Act (“FAA”), 498 F.3d 976, 2007 WL 2332068, at \*9-15, and we lack the authority to revisit the decision of a prior three-judge panel. Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Appellants’ attempts to circumvent this rule are unavailing, as this is not a case where the prior panel simply assumed California law applied without discussing the preemptive effect of the FAA. *Cf. Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (prior panel assumed Commerce Clause applied to Guam without discussing the issue); Matter of Baker, 693 F.2d 925, 925-26 (9th Cir. 1982) (prior panel exercised jurisdiction and parties did not contest the issue). Even if Shroyer did not address the specific arguments Appellants would like to make, there is no doubt that it clearly and explicitly ruled on the contested preemption issue.

AFFIRMED.